Court of Appeal **Third Appellate District** **Appellate Case No:** C088821	34-2013-80001589 TRIAL COURT CASE NUMBER COUNTY: Sacramento
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar Number, Address) Kavita Lesser, SBN 233655; David Zaft, SBN 237365 Office of the Attorney General, 300 S. Spring St., Suite 1702, Los Angeles, California 90013 Telephone No: (213) 269-6372 Attorney For: Respondent Department of Toxic Substances Control	For Court Use Only
APPELLANT: Physicians for Social Responsibility - Los Angeles; Southern California Federation of Scientists; et al. RESPONDENT: Department of Toxic Substances Control; Department of Public Health; and Real Party in Interest The Boeing Company	
RESPONDENT'S CIVIL APPEAL MEDIATION STATEMENT	

NOTE: Ten days after filing of the appellant's Civil Appeal Mediation Statement, respondent may serve and file its completed Civil Appeal Mediation Statement (Local Rule 1).

(USE ADDITIONAL SHEETS AS NECESSARY.)

1. Provide any additions or corrections to the statement of the case as set forth in the appellant's Civil Appeal Mediation Statement:

Please see attachment.

2. Respond briefly to the items identified by appellant as issues raised on appeal in the appellant's Civil Appeal Mediation Statement:

Please see attachment.

Date: March 6, 2017
David Zaft
(*Print or Type Name*)

(*Signature of Attorney*)

***A proof of service of this document on all counsel, prior to filing, must be attached.

NOTES: Recognizing the appellate record has not yet been prepared and that counsel and parties may not yet be able to identify all appellate contentions, the Court will not deem an omission from this Statement to be a waiver or forfeiture of any claim on appeal.

This form is also online in fillable form at http://www.courts.ca.gov/3140.htm. Questions about the Appellate Mediation Program should be directed to the Appellate Mediation Coordinator at 916-643-7084. For general information about your appeal, please contact the clerk's office of the Third District Court of Appeal at 916-654-0209, or visit its web site at http://www.courts.ca.gov/3dca.htm; click on Court Programs, click on Mediation Program.

ATTACHMENT

Respondent Department of Toxic Substances Control ("DTSC") provides the following information concerning this appeal.

1. Provide any additions or corrections to the statement of the case as set forth in the appellants' Civil Appeal Mediation Statement:

DTSC is overseeing the site-wide environmental investigation and cleanup of hazardous substances releases from the Santa Susana Field Laboratory site ("SSFL site"), which is being carried out by the United States Department of Energy, the National Aeronautics and Space Administration, and Real Party in Interest The Boeing Company ("Boeing"). Separate from the site investigation and cleanup, Boeing has been conducting a decades-long building decommissioning and demolition program at the site. In 2012 and 2013, Boeing developed plans to demolish six buildings and building remnants in Area IV of the site that previously had been licensed for radiological activity (the "Area IV Buildings"). These former radiological facilities had undergone decontamination, screening, and decommissioning, had been removed from Boeing's radiological license, and had been released for unrestricted use by the appropriate radiological oversight agency, either Respondent Department of Public Health ("DPH") or (for certain buildings) the federal Nuclear Regulatory Commission. Indeed, five of the six buildings underwent decommissioning and had been released for unrestricted use in the 1990s.

After Boeing notified DTSC of its intention to demolish the Area IV Buildings, DTSC began reviewing Boeing's demolition plans to ensure that Boeing's demolition and disposal activities would not interfere with or compromise the SSFL site investigation and cleanup. For example, DTSC evaluated whether removing building features might transport contaminated soil from the site. For years, Boeing and DTSC had used a review process with respect to Boeing's demolition of other buildings at the SSFL site. At the time Appellants filed their lawsuit in 2013, Boeing had demolished one of the six Area IV Buildings following DTSC review of the demolition plans for that building. DTSC's review of Boeing's demolition plans for the other five buildings is still pending.

In their lawsuit, Appellants alleged that DTSC violated the California Environmental Quality Act ("CEQA") when it reviewed Boeing's demolition plans for the Area IV Buildings without first conducting an environmental review. Appellants also alleged that DTSC engaged in an underground rulemaking in violation of the Administrative Procedure Act when, in the course of reviewing Boeing's demolition plans, DTSC allegedly relied on four documents regarding radiological release limits to establish cleanup standards for the Site. Appellants also brought claims against DPH related to Boeing's demolition activity, as discussed in DPH's mediation statement. On January 2, 2019, the trial court, Judge Richard K. Sueyoshi presiding, issued an order denying all of Appellants' claims in their entirety and finding in favor of DTSC, DPH, and Boeing.

Contrary to Appellants' allegation in their mediation statement, DTSC never "permitted" Boeing's demolition and disposal of debris from the six building and building remnants at issue in this case. Appellants allege that DTSC "granted" Boeing "approvals" for the demolitions, and that therefore DTSC was required to conduct an environmental review under the CEQA, but this

allegation is based on a misstatement of the facts and a misunderstanding of the applicable laws. Indeed, DTSC is not the permitting authority for Boeing's demolition activity. As Judge Sueyoshi found, Boeing's demolition activity does not constitute a "project" under CEQA, and DTSC never issued "a lease, permit, license, certificate, or other entitlement for use" to Boeing that authorized the demolitions and would have triggered the need for an environmental review under Public Resources Code section 21065, subdivision (c). Instead, DTSC understood that Boeing would obtain, or already had obtained, any authorizations required for the demolitions. For example, pursuant to a set of Standard Operating Procedures, Boeing agreed to maintain compliance with all local, State and federal requirements for waste characterization and management. DTSC reviewed the demolition plans to ensure that Boeing's activities would not interfere with or compromise the site investigation and cleanup, or violate the hazardous waste laws DTSC enforces. DTSC's exercise of its authority to investigate activity involving hazardous substances and to gather information relevant to its oversight of a site investigation and cleanup does not trigger environmental review under CEQA.

Regarding Appellant's underground rulemaking claim, DTSC does not have the authority to set radiological release limits, nor did it use the four documents in question to establish cleanup levels for the SSFL site. DTSC's references to the radiological release limits when reviewing Boeing's demolition plans did not "apply a rule generally" or "declare how a certain class of cases will be decided." (*See Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.) Therefore, as the trial court found, DTSC did not engage in an underground rulemaking in violation of the Administrative Procedure Act.

2. Respond briefly to the items identified by appellant as issues raised on appeal in the appellants' Civil Mediation Statement:

In their mediation statement, Appellants have simply restated the claims they made in the trial court, which the court rejected. They have not identified any specific procedural or substantive errors they believe that the court made. DTSC believes that the trial court's order and judgment are correct and should be affirmed on appeal.

DECLARATION OF ELECTRONIC SERVICE

Case Name: **PHYSICIANS FOR SOCIAL RESPONSIBILITY- LOS ANGELES, a non-profit corporation, et al., v. DEPARTMENT OF TOXIC SUBSTANCES CONTROL, et al.,**

No.: **C088821**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

On March 7, 2019, I electronically served the attached **RESPONDENT'S CIVIL APPEAL MEDIATION STATEMENT** by transmitting a true copy via this Court's TrueFiling system, addressed as follows:

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Attorneys for Real Party in Interest

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 7, 2019, at Los Angeles, California.

Dominique Colding
Declarant

Signature

LA2013950131